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Supreme Court, U. S.
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In The

# Supreme Court of the United States

October Term, 1980

No.

WILLIAM CAULFIELD, et al.,

*Petitioners,*

*v.*

THE BOARD OF EDUCATION OF THE CITY OF NEW YORK, IRVING ANKER, JOSEPH CALIFANO, JR., DAVID TATEL, RONALD ROSS, THE COALITION OF CONCERNED BLACK EDUCATORS, and GORDON AMBACH,

*Respondents.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MORRIS WEISSBERG
*Attorney for Petitioners*
15 Park Row
New York, N.Y. 10038
(212) 964-0492

HAROLD F. HAY,
*Of Counsel*

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## QUESTIONS PRESENTED

1. Did the federal Department of Health, Education and Welfare ("HEW"), and its Office for Civil Rights ("OCR"), have jurisdiction to require the Board of Education of the City of New York ("the Board"), to agree in a Memorandum of Understanding to hire and to assign teachers on the basis of their race to conform to racial quotas prescribed in such Memorandum of Understanding, where the primary objective of federal financial assistance to the Board was to provide aid to education, and not to provide employment?

2. In the absence of a finding that the Board intentionally discriminated racially against black and Hispanic teachers and applicants for employment as teachers, did the Memorandum of Understanding between OCR and the Board, and the Board's actions in carrying out its

provisions, unconstitutionally deny to the plaintiffs the equal protection of the laws, and deprive them of liberty and property without due process of law, by reverse racial discrimination?

3. Did the Board's annual racial census of teachers unconstitutionally invade the privacy of teachers, and deprive them of liberty and property without due process of law?

The aforesaid constitutional questions of law were presented in the complaint, at pages A199 to A202 of the Joint Appendix in the plaintiffs' appeal in this case to the United States Court of Appeals for the Second Circuit.

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THE BOARD OF EDUCATION OF THE CITY OF NEW YORK, IRVING ANKER, JOSEPH CALIFANO, JR., DAVID TATEL, RONALD ROSS, THE COALITION OF CONCERNED BLACK EDUCATORS, and GORDON AMBACH,

Respondents.

# PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, filed September 22, 1980, which affirmed the judgment of the United States District Court for the Eastern District of New York, dated

July 17, 1979, which dismissed the complaint after a trial before the Court (Weinstein, J.) without a jury.

## OPINIONS BELOW

The opinion and judgment of the United States Court of Appeals for the Second Circuit were filed in that Court on September 22, 1980, and are not yet officially reported. A copy of such opinion is printed beginning at page 1a of the Appendix herein.

A prior decision and opinion by the Court of Appeals, dated September 5, 1978, reported in 583 F.2d 605 (2d Cir. 1978), printed beginning at page 16a of the Appendix herein, affirmed the denial of plaintiffs' motion for a preliminary injunction against the collection of racial and ethnic data by the defendant Board of Education ("the Board"); and it reversed an order of the District Court

which remanded this case to the federal Department of Health, Education and Welfare ("HEW"), for further proceedings in which plaintiffs would be permitted to participate; and it remanded the case to the District Court for hearing on the merits of plaintiffs' allegations that a Memorandum of Understanding between HEW's Office of Civil Rights ("OCR") and the Board, dated September 7, 1977, and the Board's actions in carrying out its provisions, unconstitutionally denied to the plaintiffs the equal protection of the laws, and deprived them of liberty and property without due process of law.

## JURISDICTION

This petition for certiorari to review the judgment of the United States Court of Appeals for the Second Circuit, filed September 22, 1980, is timely made within 90 days of the filing of such

judgment.

The jurisdiction of this Court to review such judgment is invoked pursuant to 28 U.S.C. section 1254.

## CONSTITUTIONAL PROVISIONS INVOLVED

Section 1 of the 14th Amendment to the Constitution of the United States, in part, provides:

> "* * * nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

## QUESTIONS PRESENTED

1. Did the federal Department of Health, Education and Welfare ("HEW"), and its Office for Civil Rights ("OCR"), have jurisdiction to require the Board of Education of the City of New York ("the Board"), to agree in a Memorandum of Understanding to hire and to assign teachers on the basis of their race to conform to

racial quotas prescribed in such Memorandum of Understanding, where the primary objective of federal financial assistance to the Board was to provide aid to education, and not to provide employment?

2. In the absence of a finding that the Board intentionally discriminated racially against black and Hispanic teachers and applicants for employment as teachers, did the Memorandum of Understanding between OCR and the Board, and the Board's actions in carrying out its provisions, unconstitutionally deny to the plaintiffs the equal protection of the laws, and deprive them of liberty and property without due process of law, by reverse racial discrimination?

3. Did the Board's annual racial census of teachers unconstitutionally invade the privacy of teachers, and deprive them of liberty and property without due

process of law?

The aforesaid constitutional questions of law were presented in the complaint, at pages A199 to A202 of the Joint Appendix in the plaintiffs' appeal in this case to the United States Court of Appeals for the Second Circuit.

## STATEMENT OF THE CASE

On November 4, 1976, OCR wrote to the Board that the Board "is in non compliance" with Title VI of the Civil Rights Act of 1964, and with Title IX of the Education Amendments Act of 1972, because the Board had "denied minority teachers full access to employment opportunity" by using racially discriminatory procedures for testing, selecting and appointing teachers; by using racially identifiable employment pools which restricted the selection and appointment of blacks and Hispanics as teachers; by

assigning teachers to its 900 elementary schools, junior high schools and high schools by procedures and policies which placed mostly black teachers in public schools which had a majority of black students, Hispanic teachers in public schools which had a majority of Hispanic students, and white teachers in public schools which had a majority of white students (A263-300).

The Board investigated OCR's allegations, and on April 22, 1977, the Board wrote a "Response" to OCR, in which the Board denied non compliance with the 1964 Civil Rights Act, and with other federal statutes (A301-360).

The Board wrote in its "Response" that its procedures for hiring new teachers were prescribed by State statutes, which prescribed two different hiring methods, namely: Open competitive civil service examinations for license and appointment of teachers from eligible lists

of those candidates who passed such examinations, and who were placed on such eligible lists in the order of their grades or marks in such examinations, the candidate receiving the highest grade being ranked first on the eligible list, and the remaining candidates being ranked behind him in the order of their grades or marks in such examination.

Such eligible lists are dated on the date on which they are established. They remain in effect for up to four years, unless sooner exhausted by appointment of eligibles therefrom, or unless superseded by establishment of an eligible list from a subsequent examination.

An "alternative hiring method" consisted of hiring persons as teachers either by taking them "out of rank order" from existing dated, rank order eligible lists, or by establishing the appointee's

qualifications as a teacher if he or she passed a non competitive National Teachers Examination ("NTE") (A306-313).

In Rubinos v. Board of Examiners, (74 Civil 2240, GRIESA, J., S.D.N.Y.), the District Court denied a preliminary injunction to restrain the Board from hiring new teachers from dated, rank order eligible lists established as a result of open competitive civil service examinations (A312-313).

In Aspira v. Board of Education (72 Civil 1002; S.D.N.Y.), a consent decree provided that the Board shall give bi-lingual education in the Spanish language to Hispanic students who are not able to understand the English language. For this purpose, the Board hired, without competitive examination, persons whose native language was Spanish; and the Board assigned such bi-lingual teachers to pub-

lic schools attended by large numbers of Hispanic students (A313-314).

The alternative hiring method may only be used to appoint teachers to those elementary and junior high schools in which students scored in the lower 45th percentile on comprehensive annual reading tests given by the Board to all elementary and junior high school students in New York City (A306-310).

New York statutes provide that no appointment of teachers may be made from a dated, rank order eligible list until all prior eligible lists have been exhausted, or have expired (A312-313).

The Board wrote that in 1970-1971, 5,625 teachers were from minority groups. By 1974-1975, their number had increased to 7,316, an increase of 40% (A-309-310).

At the trial, the intervenor-plaintiffs, Albert Shanker, et al.,

(United Federation of Teachers, "UFT"), presented evidence that by 1979, the number of minority teachers in New York City's public schools had increased to more than 16% of all teachers; and that such percentage closely corresponded to the number of young minority college graduates in the metropolitan area seeking employment as teachers in New York City's public schools (A780-A939).

UFT also presented evidence at the trial that the Board expended more money per student, and gave more teaching time, effort and facilities to teaching black and Hispanic students than to teaching white students, by giving to such minority students smaller numbers of students per class, tutors, paraprofessionals, visual aids and other special equipment and facilities (A780-A-939).

The Board's Special Circular No.

30-R, dated December 8, 1977, repeated provisions in its 1972-1973 circular, reading:

> "All persons interested in filling supervisory vacancies shall be given equal and fair consideration by the screening and interviewing committees. There shall be no discrimination because of age, race, creed, color, national origin, sex, handicap, union or non-union affiliation. All action shall conform to public law."

The Board also wrote in its "Response" that the alternative hiring method "has contributed to the concentration of minority staff in predominantly minority schools" (A313); and it disputed OCR's allegations that the Board assigned "teachers with less experience, lower average salaries and fewer advanced degrees to schools which have higher percentages of minority students" (A263), saying that OCR's own statistics, and independent analysis, do not support such allegations (A270-271).

Memorandum of Understanding, September 7, 1977

On September 7, 1977, the Board and OCR signed a "Memorandum of Understanding", which provided, in part (A361-A364):

> "1. Not later than September of 1979, the teacher corps of each District in the system will reflect within a range of five percent, the racial-ethnic composition of the system's teacher corps as a whole for each educational level and category, subject only to educationally based program exceptions.
>
> 2. Not later than September of 1980, each individual school in the system will reflect, within a range of five percent, the racial-ethnic composition of the system's teacher corps as a whole for each educational level and category, subject only to educationally based program exceptions.
>
> * * *
>
> 6. The Board agrees, as soon as practicable to have performed a study of the relevant qualified labor pool by race, ethnicity and sex by an independent expert acceptable to the parties and pursuant to methodology and standards agreed to by the parties. Through the adoption and implementation of the affirmative action procedures and legislation provided in paragraph 4 of this Memorandum and other efforts taken or to be taken by the Board, the

> Board commits that by September of 1980, the levels of minority participation in the teaching and supervisory service will be within a range representative of the racial and ethnic composition of the relevant qualified labor pool."

In September, 1977, the Board implemented and carried out the above-quoted provisions of the Memorandum of Understanding by rehiring teachers whom it had laid off for reasons of economy, and assigning rehired white teachers to schools which had a majority of black students, and assigning rehired black teachers to schools which had a majority of white students (A939-1058).

Rehired black and Hispanic teachers were given a choice to pick teaching assignments from a box containing the names of schools which had a majority of white students (A939-1058).

Rehired white teachers were given a choice to pick teaching assignments from

a box containing the names of schools which had a majority of black students (A939-1058).

More than 4,000 white teachers declined to be rehired and assigned to black schools; and 800 rehired white teachers who accepted assignment to black schools later resigned. The Board also offered employment to 10,000 persons on open competitive eligible lists, most of whom declined to accept employment as teachers assigned to black and Hispanic schools (A939-1058).

In making such assignments of rehired teachers, the Board carried out a policy which it said in its "Response" it would carry out, as follows (A324):

> "2. Teachers and supervisors on preferred lists who are recalled are to be assigned by the Division of Personnel to foster the integration of minority and non-minority personnel and to correct any disparities of experience, salary and educational level in the distribu-

> tion of personnel. There are now thousands of teachers on preferred lists. As vacancies occur and teachers are recalled, they are assigned by the Division of Personnel. In making these assignments, integration of staff and equalization of experience, salary and education will be determining factors."

Racial Census

On October 17, 1977, the Board distributed to Community School Boards, and to public schools, its Special Circular No. 18, 1977-1978, relating to "Annual School Census", with forms for entering thereon information about race and ethnicity of teachers and school supervisors. That circular stated, in part:

> "This form will collect ethnic composition summarized by grade from the 'C' form. In addition, this form will also collect staff ethnic composition data summarized by position title as of October 31, 1977." (Emphasis supplied.)

In October, 1978, the Board directed Community School Boards to collect and to

enter on similar forms similar racial census information about teachers; and the Board suspended the plaintiff, Community School Board 26, for refusing to collect such information.

Prior Proceedings

The complaint in this action was filed in the District Court on October 31, 1977. Thereafter, UFT, by Albert Shanker, its president, and CSA (Council of Supervisors and Administrators, a labor union), by Theodore Elsberg, its president, intervened as intervenor-plaintiffs, and served complaints. Maria Banks and four others intervened as "CONCERNED BLACK EDUCATORS", intervenor-defendants, and served answers to the complaints, as did Ronald Ross, an intervenor-defendant, who served answers to the complaints.

Plaintiffs made a motion for summary judgment, or for a preliminary injunction.

The District Court (WEINSTEIN, J.) denied both motions. Plaintiffs appealed from the denial of a preliminary injunction.

By judgment dated March 15, 1978, the District Court, sua sponte, annulled the Memorandum of Understanding, and remanded this case to HEW and OCR for an administrative hearing; and the District Court certified under 29 U.S.C. section 1292(b) that there is a controlling question of law as to which there are substantial grounds for difference of opinion, and that an immediate appeal will materially advance the ultimate termination of the litigation.

By leave of the Court of Appeals, plaintiffs, intervenor-plaintiff Elsberg, the Federal defendants, and Ronald Ross, intervenor-defendant, appealed from the judgment annulling the Memorandum of Understanding.

On September 5, 1978, the Court of Appeals affirmed the order of the District Court which denied plaintiffs' motion for a preliminary injunction; and it reversed the judgment which annulled the Memorandum of Understanding, and remanded the case to the District Court for further proceedings (583 F. 2d 605).

The trial of this case began on March 30, 1979. Evidence was presented on several dates until July 3, 1979, when the trial concluded. Final judgment dismissing the complaint was entered on July 17, 1979, and a written opinion was filed on August 27, 1979.

Plaintiffs, UFT, CSA and Ronald Ross, appealed from the judgment.

Thereafter, CSA withdrew its appeal by stipulation.

On September 22, 1980, the Court of Appeals affirmed the judgment dismissing the Complaint.

## THE DECISIONS BELOW

### I.

The District Court (WEINSTEIN, J.) said that OCR had jurisdiction over the employment practices of the Board, because OCR's regulations empower it to take action against employment practices of recipients of Federal grants of money, under the "infection" theory of jurisdiction, where the recipient's employment practices have a discriminatory effect upon direct beneficiaries of Federal grants of money, such as the students in this case (A57).

The Court also said that the prior decision of the Court of Appeals (583 F. 2d 605), was that the Memorandum of Understanding between the Board and OCR was voluntary; that there was an analogy between the agreement between the Board and OCR in this case, and the agreement

between employer and labor union in United Steelworkers v. Weber, 443 U.S. 193 (1979) (A57-58); and that the issue is whether the Board and OCR had a reasonable basis for believing that the Board's employment practices may be racially discriminatory, and whether the remedial measures agreed to in the Memorandum of Understanding were reasonable in view of the perceived liability (A58-59).

The Trial Court said (A83-84):

> "[I]t is both unnecessary and inappropriate to decide whether or not the Board practices in question would dictate a finding of discrimination--either under an 'intent' standard or an 'effects' standard, in violation of the constitution or the statute. Rather, the sole purpose of the presentation here is in connection with the issues of fact and law presented by this particular case; whether, given all the evidence (1) the parties (and particularly the Board) could have reasonably believed a violation of the constitution could be shown; and (2) the measures adopted by the agreement represent a fair and reasonable effort to resolve any such reasonably perceived violations of law.

"The record supports the following findings of fact and law: (1) there was a reasonable belief on the part of the Board and OCR that the Board's hiring and assignment practices were in violation of Title VI, Title IX, and the constitution; (2) the remedial measures embodied in the agreement represent a reasonable means for attempting to cure what the parties reasonably believed were inequities in the system; and (3) those measures do not violate the plaintiffs' statutory or constitutional rights." (A184).

II.

In its second decision in this case, dated September 22, 1980, the Court of Appeals decided that OCR had jurisdiction over the employment practices of the Board, and that it had jurisdiction to require the Board to agree in the Memorandum of Understanding to hire and to assign teachers on the basis of their race to achieve and to maintain the racial quotas prescribed in the Memorandum of Understanding.

The Court of Appeals discussed the

merits of the appeal under the headings of "Teacher Assigmment" and "Hiring Goals".

Under "Teacher Assignment", two of the Judges of the Court of Appeals (MANSFIELD, MESKILL, JJ.), said that there is no reason to think that transfers of teachers pursuant to the Memorandum of Understanding will constitute a "serious professional setback"; and that until such harm is alleged, the requirement in the Bakke case (438 U.S. 265) of prior findings of intentional racial discrimination are not required.

Under "Hiring Goals" the same two Judges said that any claim that the Board will use race as a factor in its hiring decisions is, on this record, purely conjectural, and does not amount to a "case or controversy" under Article III of the Constitution. No teacher has alleged that the Memorandum has affected consideration

of his job application. Appellants have not demonstrated a "real and immediate" injury.

## REASONS FOR GRANTING THE WRIT

### 1. OCR HAD NO JURISDICTION TO REQUIRE THE BOARD OF EDUCATION TO AGREE TO HIRE AND TO ASSIGN TEACHERS ON THE BASIS OF THEIR RACE, TO CONFORM TO RACIAL QUOTAS PRESCRIBED IN THE MEMORANDUM OF UNDERSTANDING.

Section 604 of the 1964 Civil Rights Act (42 U.S.C. section 2000d-3) expressly withheld from Federal agencies jurisdiction over employment practices of recipients of federal grants of money:

> "except where a primary objective of the federal financial assistance is to provide employment."

In this case, only one federal grant of money to the Board, amounting to $17,197,533, was for the primary objective of providing employment (A494). This grant was made under the Comprehensive Employment and Training Act ("CETA")

(A494). All other federal grants of money to the Board in 1976, amounting to about $280,000,000, were for the purpose of providing aid to education (A494).

Upon the above-stated undisputed facts, the statute prohibited OCR from exercising jurisdiction over the Board's employment practices, and from requiring the Board to agree in the Memorandum of Understanding that it will hire and assign teachers on the basis of their race to conform to racial quotas prescribed in such Memorandum of Understanding.

In analogous cases, Federal courts have decided that OCR has no power under Title IX to regulate employment practices of recipients of federal grants of money. Isleboro School Committee v. Califano, 593 F. 2d 424 (1st Cir. 1979), cert. den. sub. nom. Harris v. Isleboro School Committee, 100 S.Ct. 467 (1979); Romeo Com-

munity Schools v. HEW, 600 F. 2d 581 (6th Cir. 1979), affg. 438 F. Supp. 1021 (D.C. Mich. 1977); Junior College v. Califano, 597 F. 2d 119 (8th Cir. 1979), cert. den. 100 S.Ct. 467 (1979).

The Court of Appeals quoted its prior decision that "the objective of OCR's investigation was to alleviate discrimination against minority schoolchildren and not against minority teachers", meaning that the Board's employment practices discriminated against and affected unfavorably the education of minority students.

We submit that the statutory prohibition of agency action relating to employment practices of recipients of federal financial assistance given for purposes other than employment, cannot be disregarded, and thus nullified in practice, by giving no effect to such prohi-

bition on the ground that racial discrimination in hiring or assigning teachers has a damaging effect upon the education of black and Hispanic students taught by teachers subjected to racial discrimination in hiring or assignment to particular schools.

Alleged racial discrimination against beneficiaries of federal financial assistance is not a valid reason for giving no effect to the statute prohibiting federal agencies from taking any action about racially discriminatory employment practices of recipients of federal financial assistance where the primary objective of such financial assistance was to provide aid to education, and not to provide employment.

Title VII of the 1964 Civil Rights Act gives to the Equal Employment Opportunity Commission ("EEOC") the power to investigate allegations of racially dis-

criminatory employment practices, and to require elimination or correction of any such employment practices.

Congress intended to give EEOC the function of regulating racially discriminatory employment practices, and assigned to federal agencies which give financial assistance the function of regulating racially discriminatory employment practices only in those cases in which the primary objective of federal financial assistance is to provide employment, because in such a case racially discriminatory employment practices defeat the primary purpose of such financial assistance.

Moreover, the Trial Court made a finding that the plaintiffs submitted evidence that each of the local community school districts had a non-discriminatory number of teachers with five or more years of teaching experience (A21), so

that there was no factual basis for the allegation that racial discrimination in hiring or assigning teachers had a damaging effect upon the education of black and Hispanic students.

The United Federation of Teachers ("UFT"), and the Board, both presented extensive evidence that the quality and quantity of education given to black and Hispanic students is not inferior to that given to white students; and that measured by the pupil/teacher ratio; average class size; percent teachers with five or more years of experience; city tax levy funds expended; and reimbursable funds expended, there were no important differences between predominantly minority and non-minority community school districts and the public schools therein (A780-938).

UFT also presented evidence that the Board expended more money per student, and

gave more teaching time, effort and facilities to teaching black and Hispanic students than to teaching white students, by giving to such black and Hispanic students smaller numbers of students per class, tutors, paraprofessionals, visual aids and other special equipment and facilities (A780-939).

The Court of Appeals cited United States v. Jefferson County Board of Education, 372 F. 2d 836, 882-86 (5th Cir. 1966), affd. en banc, 380 F. 2d 385 (5th Cir., 1967), cert. denied, 389 U.S. 840 (1967). The Court of Appeals said:

> "section 2000d-3 does not bar an action requiring desegregation of school faculty and that faculty integration is essential to student integration."

This is not a case of de jure racial segregation of students or teachers. We submit that the above-quoted statement has limited application only to cases of

de jure racial segregation of public schools.

2. IN THE ABSENCE OF A FINDING THAT THE BOARD INTENTIONALLY DISCRIMINATED RACIALLY AGAINST BLACK AND HISPANIC TEACHERS AND APPLICANTS FOR EMPLOYMENT AS TEACHERS, THE MEMORANDUM OF UNDERSTANDING BETWEEN OCR AND THE BOARD, AND THE BOARD'S ACTIONS IN CARRYING OUT ITS PROVISIONS, UNCONSTITUTIONALLY DENIED TO THE PLAINTIFFS THE EQUAL PROTECTION OF THE LAWS, AND DEPRIVED THEM OF LIBERTY WITHOUT DUE PROCESS OF LAW, BY REVERSE RACIAL DISCRIMINATION.

The decision of the Trial Court stated (A83-84):

> " * * * it is both unnecessary and inappropriate to decide whether or not the Board practices in question would dictate a finding of discrimination -- either under an 'intent' standard or an 'effects' standard, in violation of the constitution or statutes. Rather, the sole purpose of the presentation here is in connection with the issues of fact and law presented by this particular case: whether, given all the evidence, (1) the parties (and particularly the Board) could have reasonably believed a violation of the constitution or the statutes could be shown; and (2) the measures adopted by the agreement represent a fair and reasonable effort to resolve

any such reasonably perceived violations of law."

The judgment of the Trial Court stated (A27-28):

"The court does not decide if, in fact, there was such discrimination. This issue should not be decided on the merits because such a decision, in the context and posture of this case, would discourage voluntary efforts toward compliance with statutory and constitutional requirements. It determined that, under the circumstances, the compliance agreement was a reasonable and sensible way of voluntarily settling the dispute between OCR and the Board. Evidence presented by the Board and the plaintiffs rebutted, in several respects, that presented by the federal defendants and intervenors-defendants. The evidence does support a reasonable belief by the Board that because of the arguable violations of Titles VI and IX and the fourteenth amendment, it was desirable and provident to enter into a remedial agreement eliminating these violations. The Board reasonably believed that a failure to enter into an agreement with OCR would involve substantial possibility of a cut-off of millions of dollars of federal aid, with attendant serious disruption of the City's educational system. However, the Board reasonably believed that were the federal government to seek in-

junctive relief from the federal courts against the challenged practices, the Board could have been found to have discriminated in violation of Titles VI and IX and the fourteenth amendment, with a resulting decree far more drastic than that agreed to."

Two judges in the Court of Appeals (MANSFIELD, MESKILL, JJ.), decided the appeal on a different ground from the Trial Court, as follows:

"Caulfield argues that paragraph 6 [of the Memorandum of Understanding] requires the Board to hire on the basis of a racial quota. He contends that this is improper when there has been no finding of an intention to discriminate. However, any claim that the Board will use race as a factor in its hiring decisions is, on this record, purely conjectural and therefore does not amount to a 'case or controversy' under article III of the Constitution. No teacher has alleged that the Memorandum has affected the consideration of his job application. Appellant has not demonstrated, as he must, that the threatened injury of which he complains is 'real and immediate', rather, it is 'conjectural' and 'hypothetical.' See O'Shea v. Littleton, 414 U.S. 488, 494 (1974); Golden v. Zwickler, 394 U.S. 103, 108-10 (1969)."

At the trial, Dr. Theodore Lang, Associate Superintendent of Schools in charge of Personnel, his successor, Frank Arricale, the Board's Director of Personnel, Marie De Canio, Assistant Director of Personnel, and Gerald Brooks, a Personnel Officer, testified that immediately after the Board signed the Memorandum of Understanding on September 7, 1977, it carried out its provisions for appointment and assignment of teachers on the basis of their race to correct racial imbalance in the employment and assignment of teachers, by rehiring teachers whom it had laid off for reasons of economy, and assigning rehired white teachers to public schools which had a majority of black students, and assigning rehired black teachers to schools which had a majority of white students, by directing rehired white teachers to select a school assign-

ment from a box which contained assignments to public schools which had a majority of black or Hispanic students; and by directing rehired black and Hispanic teachers to select a school assignment from a box which contained assignments to public schools which had a majority of white students (A939-1058).

More than 4,000 white teachers declined to be rehired and assigned to black or Hispanic schools; and 800 rehired white teachers who accepted assignment to black schools later resigned. The Board also offered employment to 10,000 persons on open competitive eligible lists, most of whom declined to accept employment as teachers assigned to black and Hispanic schools (A939-1058).

In making such assignments of rehired teachers, the Board carried out a policy which it said in its "Response" it would

carry out, as follows (A324):

> "2. Teachers and supervisors on preferred lists who are recalled are to be assigned by the Division of Personnel to foster the integration of minority and non-minority personnel and to correct any disparities of experience, salary and educational level in the distribution of personnel. There are now thousands of teachers on preferred lists. As vacancies occur and teachers are recalled, they are assigned by the Division of Personnel. In making these assignments, integration of staff and equalization of experience, salary and education will be determining factors."

Since 1977, the Board has continued to assign rehired teachers, and newly hired teachers, on the basis of their race, to achieve and to maintain the racial quotas prescribed in the Memorandum of Understanding.

We submit that since the Trial Court expressly declined to find that the Board intentionally discriminated racially against black and Hispanic teachers and applicants for employment as teachers, OCR

and the Board could not constitutionally agree in the Memorandum of Understanding on race conscious remedies to correct racial imbalance by hiring new teachers on the basis of their race, and by assigning to particular schools all teachers on the basis of their race, in order to achieve and to maintain the racial quotas prescribed in the Memorandum of Understanding. Regents of University of California v. Bakke, 438 U.S. 265, 287 (1979); Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 265 (1977); Washington v. Davis, 426 U.S. 229, 245-246 (1976); Personnel Administrator of Massachusetts v. Feeney, 442 U.S. 256 (1979).

Under the heading "Teacher Assignment", the decision of the Court of Appeals stated, in part:

> "Although teachers do have a cognizable interest in avoiding transfer

> within the system from one school to another, Rodriguez v. Board of Education, 620 F. 2d 362 (2d Cir. 1980), the teachers' interest is a limited one. Under Rodriguez, the teachers have an interest, under title VII, in being free from transfers that 'constitute a serious professional setback' and that are made for improper reasons such as sex discrimination."

In the absence of a finding of intentional racial discrimination, Congress expressly prohibited federal agencies from requiring transfers of teachers to overcome racial imbalance, by providing in 20 U.S.C. section 1751:

> "No provision of this Act shall be construed to require the assignment or transportation of students or teachers in order to overcome racial imbalance."

In the absence of a finding of intentional racial discrimination, the provisions in the Memorandum of Understanding for hiring and assigning teachers on the basis of their race to achieve and to maintain the racial quotas prescribed in

such Memorandum constitute unconstitutional racial preference.

In Regents of University of California v. Bakke, 438 U.S. 265, 307 (1979), the Court said:

> "Preferring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake. This the Constitution forbids."

The collective bargaining agreement between Kaiser Steel Company and the Steelworkers Union, approved in United Steelworkers v. Weber, 443 U.S. 193 (1979) is not a precedent in this case, because that case involved title VII of the 1964 Civil Rights Act, which does not require a finding of intentional racial discrimination, whereas this case involves title VI of the 1964 Civil Rights Act, which does require a finding of intentional racial discrimination.

Moreover, in the Weber case, the

Court said:

> "Since the Kaiser-USWA plan does not involve state action, this case does not present an alleged violation of the Equal Protection Clause of the Constitution."

In this case, unlike the Weber case, the racial preferences provided in the Memorandum of Understanding, and the Board's actions in granting such preferences, constitute State action by the Board, a State agency, and Federal action by OCR, a Federal agency.

The constitutionality of the statutory 10% set aside for minority contractors involved in Fullilove v. Klutznick, 100 S.Ct. 2758 (1980), was sustained on the ground that in enacting the statute the Congress made a legislative finding that minority contractors had been subjected to racial discrimination in the awarding of governmental contracts, so that the statute was based on a finding

of racial discrimination.

Although OCR called the allegations in its letter of November 9, 1976 "findings" based on its investigation, the Board disputed such "findings" in its "Response"; and after trial of factual issues presented by OCR's allegations, the Trial Court declined to find that the Board intentionally discriminated racially in its hiring and assignment of teachers.

In these circumstances, the Weber and Fullilove cases do not support the constitutionality of the racial preferences in the hiring and assignment of teachers provided in the Memorandum of Understanding; and they do not support the constitutional power of OCR and the Board to agree to such racial preferences in the Memorandum of Understanding.

Although teachers do not have a constitutional right to be assigned to work

in a particular school, or to be free from transfer and reassignment to other schools from time to time, they do have a constitutional right to be free from transfer and reassignment solely on the basis of their race, just as they have a constitutional right to be free from transfer and reassignment solely on the basis of their sex.

Race and sex do not provide any relevant factual basis for transfer and assignment of teachers.

Those plaintiffs who are teachers are personally affected by the provisions of the Memorandum of Understanding for assignment of teachers to particular public schools on the basis of their race, because they are subject to such assignment at any time. Therefore, such plaintiffs face a "real and immediate" injury from reassignment on the basis of their race

under the Memorandum of Understanding.

In O'Shea v. Littleton, 414 U.S. 488, 496 (1973), the Court said that "past wrongs are evidence bearing on whether there is a real and immediate threat of repeated injury".

The provisions of the Memorandum of Understanding that teachers shall be hired and assigned on the basis of their race to achieve and to maintain employment of black and Hispanic persons as teachers "within a range representative of the racial and ethnic composition of the relevant qualified labor pool" have been in effect continuously since September 7, 1977. Plaintiffs, as members of local community school boards, superintendents of community school districts, principals of public schools, and teachers in public schools, have been subject to the provisions of the Memorandum of Understanding

for hiring and assignment of teachers on the basis of their race continuously since September 7, 1977.

OCR pressed the Board to agree to the Memorandum of Understanding by threatening to cut off federal funds if the Board did not agree to correct alleged racial discrimination in its employment of black and Hispanic teachers, and alleged sexual discrimination in its employment of women.

In these circumstances, the plaintiffs "will in fact be perceptibly harmed by the challenged agency action". United States v. Scrap, 412 U.S. 669, 688 (1972).

Joyce Lewis Shapiro, an intervenor-plaintiff, made an affidavit that she was subjected to racial discrimination by the Board in its performance of its contractual obligations under the Memorandum of Understanding, as follows (A366):

> "4. At the commencement of the 1977-78 school year, I was called to the

> Board of Education hiring hall where I selected a teaching assignment to Community School District 22, Brooklyn, by drawing such assignment from a box.
>
> 5. I reported to Community School District 22 for assignment to a specific elementary school within that District but was told to return to the Central Board of Education for reassignment. I was told that District 22 was rejecting my assignment because I was white and that District needed black teachers."

Those plaintiffs who are members of community school boards or superintendents of community school districts have a direct personal stake in the constitutionality of the provisions of the Memorandum of Understanding for hiring and assignment of teachers on the basis of their race, because they may be subject to personal liability for damages for such unconstitutional racially discriminatory actions.

In Board of Education v. Allen, 392 U.S. 236, 241 (1968), it was decided that members of a school board had standing to

sue for judgment declaring unconstitutional a statute directing school districts to lend textbooks free of charge to students in parochial schools. See, also: Baker v. Carr, 369 U.S. 186, 204 (1962).

Those plaintiffs who are members of community school boards, or superintendents of community school districts, may be subject to personal liability for damages for their personal participation in actions, in obedience to directives of the Board, carrying out the provisions of the Memorandum of Understanding that teachers shall be hired and assigned to public schools on the basis of their race to achieve racial quotas or "goals" prescribed in such Memorandum, if they knew, or should have known, that their actions would violate the constitutional rights of persons affected thereby. Wood v. Strickland, 420 U.S. 308, 322 (1975);

Scheuer v. Rhodes, 416 U.S. 232 (1973); Bertot v. School Dist. #1, Albany County, Wyoming, 522 F. 2d 1171 (10th Cir. 1975); Simineo v. School Dist. #16, Park County, Wyo., 594 F. 2d 1353 (10th Cir. 1979).

3. THE BOARD'S ANNUAL RACIAL CENSUS OF TEACHERS UNCONSTITUTIONALLY INVADED THEIR PRIVACY, AND DEPRIVED THEM OF LIBERTY AND PROPERTY WITHOUT DUE PROCESS OF LAW.

The second decision of the Court of Appeals in this case, dated September 22, 1980, did not discuss the constitutionality of the racial census of teachers, which was challenged in the complaint, and by motion for preliminary injunction, denial whereof was affirmed in the 1978 decision of the Court of Appeals.

In its first decision in this case, 583 F. 2d 605, the Court of Appeals affirmed the denial of plaintiffs' motion for a preliminary injunction against a racial census.

The Board required those plaintiffs who are members of community school boards, and superintendents of community school districts, to make an annual racial census of teachers and to report to the Board the race of each teacher employed in the community school district.

In Fullilove v. Klutznick, 100 S.Ct. 2758 (1980), the dissenting opinion of Justice Stewart speaks of "the odious practice of delineating the qualities that make one person a Negro and make another white".

Questions about the race of teachers unconstitutionally invade the privacy of teachers who are required to answer them, and they unconstitutionally deny to them the equal protection of the laws.

They also deprive members of community school boards and superintendents of community school districts of liberty and

property without due process of law, by requiring them to compel teachers whom they supervise to answer such unconstitutional questions.

In Gibson v. Florida Legislative Committee, 372 U.S. 539, 546 (1962), it was decided that a legislative committee's subpoena of records of membership in N.A.A.C.P. unconstitutionally invaded the privacy of persons named in membership lists, and, also, caused harm to them and to N.A.A.C.P.; and that the legislative committee had shown no compelling governmental reason for disclosure to it of the membership lists of N.A.A.C.P.

A racial census of teachers violates their most intimate personal privacy -- their right to be let alone -- without being compelled to disclose their race. Compare: Griswold v. Connecticut, 381 U.S. 479, 485-486 (1964); Roe v. Wade,

410 U.S. 113, 152-153 (1972); Whalen v. Roe, 429 U.S. 589, 599 (1976); Stanley v. Georgia, 394 U.S. 557 (1968); California Bankers Assn. v. Shultz, 416 U.S. 21 (1973).

The Freedom of Information Act (5 U.S.C. section 522) excepts from disclosure:

> "(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy."

See: Metropolitan Life Insurance Co. v. Usery, 426 F. Supp. 150, 168 (D.C.D.C. 1976).

Asking a teacher to disclose her race, with her answer entered in a governmental record, unconstitutionally invades her privacy.

No substantial governmental interest justifies the asking of the question, or the compelling of the answer.

## CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED.

December 15, 1980

Respectfully submitted,

MORRIS WEISSBERG
Attorney for Petitioners

HAROLD F. HAY
of counsel

Footnote re Parties:

In addition to the parties named in the caption of this Petition the United Federation of Teachers (Albert Shanker, et al.) was an Intervenor-Plaintiff who participated in the appeal to the Court of Appeals; and the Council of Supervisors and Administrators, a labor union of School Supervisors, was an Intervenor-Plaintiff which withdrew its appeal to the Court of Appeals from the judgment dismissing its complaint.

# APPENDIX

OPINION AND JUDGMENT DATED SEPTEMBER 22, 1980

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 733, 734, 1000—September Term, 1979

(Argued May 21, 1980 Decided September 22, 1980)

Docket Nos. 79-6191, -6193, -6201

WILLIAM CAULFIELD, *et al.*,

*Plaintiffs-Appellants,*

and

ALBERT SHANKER, *et al.*,

*Intervenors-Plaintiffs-Appellants,*

and

THEODORE ELSBERG, *et al.*,

*Intervenors-Plaintiffs,*

v.

BOARD OF EDUCATION OF THE CITY OF NEW YORK, IRVING ANKER,

*Defendants-Appellees,*

and

JOSEPH CALIFANO, JR., *et al.*,

*Defendants-Appellees,*

ARTHUR N. EISENBERG, New York Civil Liberties Union, New York, New York (E. Richard Larson, American Civil Liberties Union, New York, New York, Jeanne Silver Frankl, Public Education Association, New York, New York, on brief), *for Intervenors-Defendants-Appellees Coalition of Concerned Black Educators.*

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OAKES, *Circuit Judge:*

This appeal, yet another chapter in the litigation concerning hiring, assignment and promotion practices in the New York City school system,[1] is from a final judgment entered on July 17, 1979, in the United States District Court for the Eastern District of New York, Jack B. Weinstein, *Judge,* dismissing a complaint raising constitutional and statutory objections to a "Memorandum of Understanding" (Memorandum) between the Board of Education of the City of New York (Board) and the Office for Civil Rights (OCR) of the Department of Health, Education and Welfare (HEW). The challenged Memorandum, executed on September 7, 1977, obligated the Board to change its teacher employment and assignment policies in order to remedy the discrimination found by an OCR investigation

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1 *See Board of Educ. v. Harris*, 444 U.S. 130 (1979), *aff'g* 584 F.2d 576 (2d Cir. 1978); *Board of Educ. v. Harris*, 622 F.2d 599 (2d Cir. 1979), *aff'g* No. 78 C 2135 (E.D.N.Y. Dec. 22, 1978); *Caulfield v. Board of Educ.*, 583 F.2d 605 (2d Cir. 1978), *aff'g in part and rev'g in part* 449 F. Supp. 1203 (E.D.N.Y. 1978); *Board of Educ. v. Harris*, No. 79 C 3233 (E.D.N.Y. Feb. 21, 1980), *appeal docketed*, No. 80-6050 (2d Cir. Apr. 29, 1980).

conducted pursuant to Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d to 2000d-6, and Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-1686. Shortly after the Memorandum was signed, plaintiffs-appellants, including a local school board and teachers allegedly affected by the agreement, filed suit against the Board, the State Commissioner of Education, and CCR, seeking declaratory and injunctive relief against certain provisions of the Memorandum as violative of the fifth and fourteenth amendments and Titles VI and VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d, 2000e-2. The district court permitted the United Federation of Teachers, the Council of Supervisors and Administrators, and others to intervene as plaintiffs and permitted the Coalition of Concerned Black Educators, Ronald Ross, the Public Education Association, and the American Civil Liberties Union to intervene as defendants.

In a previous chapter in the history of this litigation, this court affirmed a denial of injunctive relief against the enforcement of a provision of the Memorandum requiring the collection of racial and ethnic data by the Board. At the same time this court reversed the district court's order remanding the case to HEW for further proceedings in which plaintiffs-appellants would be permitted to participate. *Caulfield v. Board of Education (Caulfield I)*, 583 F.2d 605 (2d Cir. 1978). We found in that case that the Memorandum was "voluntary" and that HEW, in seeking voluntary compliance with Title VI before resorting to fund termination, was not required to allow the plaintiffs-appellants to participate in formulating the Memorandum. *Id.* at 612-15; *see* 42 U.S.C. § 2000d-1. We then remanded for a hearing on the merits of the plaintiffs'

constitutional and statutory challenges to the Memorandum. The present appeal is from the district court's dismissal of plaintiffs' complaints and the court's determination that the Memorandum is valid.

FACTS

As a recipient of federal funds, the Board must comply with the nondiscrimination provisions of Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d,[2] Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681,[3] and their implementing regulations;[4] it may not discriminate on the basis of race, color, national origin or sex in education programs that receive federal funds. OCR has the responsibility of ensuring compliance through reviews, investigations and complaint resolution. As we recounted in *Caulfield I*, *see* 583 F.2d & n.3, the director of OCR advised the Board by letter dated November 9, 1976, that the Board was not in compliance with Title VI because it had (1) "denied minority teachers full access to employment opportunity" by using racially discriminatory selection and testing procedures and by using

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2 42 U.S.C. § 2000d provides:

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

3 20 U.S.C. § 1681 provides in part:

> (a) No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . .

4 The Title VI regulations are in 45 C.F.R. §§ 80.1-.13 (1979); the Title IX regulations are in 45 C.F.R. §§ 86.1-.71 (1979).

racially identifiable employment pools in a way that restricted placement, (2) assigned teachers and principals in a manner that created, confirmed and reinforced racial identifiability of the system's schools, and (3) "assigned teachers with less experience, lower average salaries and fewer advanced degrees to schools with higher percentages of minority students." OCR also found the Board in violation of Title IX because it had denied females equal access to supervisory positions, provided less financial support for female athletic programs, and deprived female teachers of seniority rights and other compensation by failing to eliminate the effects of past discriminatory leave policies.

Ten months of negotiation ensued. During this time the Board's Deputy Chancellor Bernard Gifford chaired an internal committee reviewing and evaluating OCR's allegations. What is known as "the Gifford Report" substantiated and confirmed many of OCR's findings, although it denied any discriminatory intent on the part of the Board. *See Caulfield I,* 583 F.2d at 609 n.5. The Board itself on April 22, 1977, suggested affirmative efforts to equalize employment opportunities. *See id.* at 608. OCR rejected this proposed compliance plan but further negotiations resulted in the promulgation of the September Memorandum of Understanding challenged in this lawsuit. The Memorandum establishes a three-year plan to comply with Title VI and Title IX through affirmative action. We have set out in the margin key provisions of the agreement as they are reported in Judge Weinstein's memorandum opinion.[5]

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[5] 1. Not later than September of 1979, the teacher corps of each District in the system will reflect, within a range of five percent, the racial-ethnic composition of the system's teacher corps as a

## THE PROCEEDINGS BELOW

In appellants' complaint they alleged that HEW lacked Title VI jurisdiction to investigate the Board's

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whole for each educational level and category, subject only to education-based program exceptions.

2. Not later than September of 1980, each individual school in the system will reflect, within a range of five percent, the racial-ethnic composition of the system's teacher corps as a whole for each educational level and category, subject only to educationally-based program exceptions.

3. The Board of Education will demonstrate to the Office for Civil Rights, subject to prescribed review, that any failure to meet the commitments set forth in paragraphs one and two hereof results from genuine requirements of a valid educational program. In addition, the Board will demonstrate that it has made and is continuing to make special efforts to overcome the effects of educationally-based program exceptions through effective use of such mechanisms as recertification, recruitment and special assignment of teachers.

4. The Board . . . will adopt and implement the following affirmative action procedures, and will sponsor and actively support state legislation at the next session of the Legislature where necessary to accomplish these ends.

(a) Any test used henceforth to determine whether a person is qualified for a teaching position in the system shall be validated prior to its being administered; except that in cases of demonstrable educational necessity . . . a test may be used prior to its validation for temporary assignments, provided that validation shall be accomplished as soon as practicable. . . .

(b) All existing eligibility lists by license shall be combined, and the names of all persons contained thereon shall be merged with the names of any persons who have passed any new tests, without regard to the dates of examinations.

(c) Rank ordering of persons who have passed examinations for the system shall be abolished.

(d) In employing and assigning teachers pursuant to these modified standards and procedures, the Board . . . will implement affirmative action mechanisms found to be appropriate, such as, for example, giving hiring preferences to all eligible persons with prior experience in the system.

* * * * *

*(footnote continued on next page)*

employment practices because under 42 U.S.C. § 2000d-3[6] HEW can take such action only with respect to programs in which providing employment is a "primary objective of the Federal financial assistance." They further alleged that the agreement's remedial measures are impermissible absent a formal administrative or judicial finding of intentional discrimination and that the evidence does not support a finding of intentional discrimination. *Cf. Lora v. Board of Education*, No. 79-7521, slip op. 3253 (2d Cir. June 2,

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5. The Board . . . agrees that, in the event that the above-described legislation is not adopted so as to govern employment decisions for the 1978-79 school year, the Board will seek appropriate litigation in support of the agreed objectives.

6. The Board agrees, as soon as practicable to have performed a study of the relevant qualified labor pool by race, ethnicity and sex by an independent expert acceptable to the parties and pursuant to methodology and standards agreed to by the parties. Through the adoption and implementation of the affirmative action procedures and legislation provided in paragraph 4 . . . and other efforts . . . the Board commits that by September of 1980, the levels of minority participation in the teaching and supervisory service will be within a range representative of the racial and ethnic composition of the relevant qualified labor pool.

It is understood that this commitment shall not require the Board to lay off any teacher currently employed by the Board or to hire any teacher who has not met appropriate requirements for employment, not inconsistent with this agreement. It is further understood that the commitment made herein does not establish quotas. Failure to meet this commitment shall not be considered a violation of this agreement if the Board demonstrates that it has implemented the provisions of this agreement in a good faith effort to meet the commitment made herein.

6 42 U.S.C. § 2000d-3 provides:

Nothing contained in this subchapter shall be construed to authorize action under this subchapter by any department or agency with respect to any employment practice of any employer, employment agency, or labor organization except where a primary objective of the Federal financial assistance is to provide employment.

1980) (intentional discrimination required to make out a violation of Title VI). Appellants also contended that the Memorandum, by requiring teacher assignments on the basis of race, established a "quota system" in violation of a number of statutes, including Titles VI and VII of the Civil Rights Act of 1964, and the fifth and fourteenth amendments.

The district court held that HEW had jurisdiction to investigate and seek compliance under the authority of 45 C.F.R. § 80.3(c)(3) (1979),[7] a Title VI regulation

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7 45 C.F.R. § 80.3(c) provides in part:

*Employment practices.* (1) Where a primary objective of the Federal financial assistance to a program to which this regulation applies is to provide employment, a recipient may not (directly or through contractual or other arrangements) subject an individual to discrimination on the ground of race, color, or national origin in its employment practices under such program (including recruitment or recruitment advertising, employment, layoff or termination, upgrading, demotion, or transfer, rates of pay or other forms of compensation, and use of facilities), including programs where a primary objective of the Federal financial assistance is (i) to reduce the employment of such individuals or to help them through employment to meet subsistence needs, (ii) to assist such individuals through employment to meet expenses incident to the commencement or continuation of their education or training, (iii) to provide work experience which contributes to the education or training of such individuals, or (iv) to provide remunerative activity to such individuals who because of handicaps cannot be readily absorbed in the compe[ti]tive labor market. . . .

* * * * *

(3) Where a primary objective of the Federal financial assistance is not to provide employment, but discrimination on the ground of race, color, or national origin in the employment practices of the recipient or other persons subject to the regulation tends, on the ground of race, color, or national origin, to exclude individuals from participation in, to deny them the benefits of, or to subject them to discrimination under any program to which this regulation applies, the foregoing provisions of this paragraph (c) shall apply to the employment practices of the recipient or other persons subject to the regulation, to the extent necessary to assure equality of opportunity to, and nondiscriminatory treatment of, beneficiaries.

authorizing oversight of the employment practices of a recipient of federal funds when such practices have a discriminatory impact upon direct beneficiaries of the federal funds, in this case, the students themselves. Here, HEW had alleged that the Board's employment practices have such an effect because discrimination in teacher hiring and assignment has deprived students of equal educational opportunity both by reinforcing the racial identifiability of schools and, in some cases, by resulting in the assignment of less qualified or experienced teachers to predominantly minority schools. The district court found that discrimination by race in the hiring and assignment of teachers or supervisors constitutes discrimination against students. In addition, the court rejected the argument that the Memorandum must be invalidated in the absence of a finding of intentional discrimination. Instead, it upheld the agreement, stating that the issue was really whether the parties entering into a Title VI or Title IX remedial plan had a reasonable belief that the practices at issue might result in liability, whether the remedial measures adopted are reasonable in view of the perceived liability, and whether the measures violate statutory or constitutional rights.

## DISCUSSION

### *Jurisdiction*

We agree with the court below that Title VI enforcement procedures apply to the Board's teacher hiring and assignment practices and that HEW therefore had jurisdiction to investigate and seek compliance. Appellants rely upon section 604 of the Civil Rights Act of 1964, 42 U.S.C. § 2000d-3, the

section which authorizes administrative action under Title VI with respect to employment practices only when a primary objective of federal funding is to provide employment.[8] Their argument is similar to the one advanced in 1978 by appellants in *Caulfield I*, 583 F.2d at 610-11. There the argument was made to oppose the collecting of statistics regarding the ethnic and racial composition of the teaching staff. We found, however, that OCR's charging letter to the Board of November 9, 1976, "specifically noted that its concern with discriminatory employment practices was motivated by the unfortunate effect that these practices exercise on minority schoolchildren." *Id.* at 611. Accordingly, we held that OCR's investigation was within the bounds of 42 U.S.C. § 2000d, which outlaws discrimination in federally funded programs, and not 42 U.S.C. § 2000d-3, because "the objective of OCR's investigation was to alleviate discrimination against minority schoolchildren and not against minority teachers as such." 583 F.2d at 611. We see no reason to depart from our holding in that case. Indeed, we are bound by it, but even if we were not, we would agree with the Fifth Circuit decision in *United States v. Jefferson County Board of Education*, 372 F.2d 836, 882-86 (5th Cir. 1966) (Wisdom, J.), *aff'd en banc*, 380 F.2d 385 (5th Cir.) (per curiam), *cert. denied*, 389 U.S. 840 (1967), that section 2000d-3 does not bar an action requiring desegregation of school faculty and that faculty integration is essential to student integration. *See also Marable v. Alabama Mental Health Board*, 297 F.Supp. 291, 297-98 (M.D. Ala. 1969) (three-judge court) (Johnson, J.).

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[8] *See* note 6 *supra*.

Appellants also argue that HEW lacked jurisdiction under Title IX to investigate the school system's employment practices. Again, we agree with the lower court that the government could reasonably proceed on the theory that a school system's discrimination against women in access to supervisory positions would have a discriminatory effect on students, the direct beneficiaries of the federal aid. *See Islesboro School Committee v. Califano*, 593 F.2d 424, 430 (1st Cir. 1979), *cert. denied*, 100 S. Ct. 467 (1980).

*Teacher Assignment*

The author of this opinion would be content to affirm the holding concerning the validity of the Memorandum on the same ground relied on by Judge Weinstein below, *viz.*, that the affirmative remedies required under the Memorandum of Understanding were reasonable in light of the parties' reasonable belief that the practices at issue might result in liability under Titles VI and IX and under the Constitution. As early as 1958 a New York state court found that teacher assignment practices were racially discriminatory and that such practices had a discriminatory effect on students. *In re Skipwith*, 14 Misc. 2d 325, 180 N.Y.S.2d 852 (Dom. Rel. Ct. 1958). As the district court in the present case noted, since 1951 virtually every commission, agency and consulting firm reviewing the Board of Examiners' system of competitive examinations for teachers has called for its "substantial reform or abolition. . . . A chief reason for this criticism has been that the system tended to discourage minority teachers from applying and to screen them out." In *Caulfield I* we discussed OCR's and the Board's own findings concerning the denial of full access to employment opportunity to

minority teachers, the creation and reinforcement of racial identifiability of schools by the placement of teachers, and the assignment of minority teachers with less experience, lower salaries and fewer advanced degrees to predominantly minority schools. *See* 583 F.2d at 608-09 & nn. 3 & 5.

In upholding the validity of the Memorandum, the district court compared this voluntary agreement to remedy possible Title VI and Title IX violations to the voluntary agreement to remedy possible Title VII violations upheld in *United Steelworkers of America v. Weber*, 443 U.S. 193 (1979). The argument for upholding a voluntary affirmative action plan is even stronger in this case than it was in the *Weber* case, for here HEW itself initiated the investigation and notified the Board of alleged Title VI and Title IX violations. *Cf. Weber*, 443 U.S. at 204 (Title VII does not prohibit private parties from voluntarily taking steps to comply with Title VII); *Regents of the University of California v. Bakke*, 438 U.S. 265, 301-02 & n.41 (1978) (Powell, J.) (racial preferences may be upheld against constitutional attack when based on findings by administrative body charged with monitoring compliance with antidiscrimination statutes). In fact, both Title VI and Title IX *require* the government to seek voluntary compliance before terminating funds or taking other steps to enforce compliance. *See* 42 U.S.C. § 2000d-1; 20 U.S.C. § 1682. Under the circumstances of this case, we agree with the district court that the voluntary agreement between OCR and the Board, though possibly affecting the interests of teachers and others who did not participate in its formulation, is a reasonable and valid effort by the Board to comply with Titles VI and IX.

My colleagues, however, rest their decision on a different ground and do not reach the question that the court below and I consider. Their view is that the case in its present posture does not contain an allegation that any individual's "liberty or privacy interests" have been invaded by state action. They recognize that Mr. Justice Powell's determinative opinion in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), requires that every person has a right to treatment as an individual, free from the adverse consequences of race- or sex-conscious remedies unless there has been a prior administrative, legislative or judicial determination of intentional discrimination against the particular group to be benefitted by the affirmative action plan. Of course, no such finding has been made in the present case.

The absence of such a finding, however, does not invalidate the Memorandum. Although teachers do have cognizable interest in avoiding transfer within the system from one school to another, *Rodriguez v. Board of Education*, 620 F.2d 362 (2d Cir. 1980), the teachers' interest is a limited one. Under *Rodriguez*, the teachers have an interest, under Title VII, in being free from transfers that "constitute a serious professional set-back" and that are made for improper reasons such as sex discrimination. *See Id.* at 365-66. To be sure, the *Rodriguez* court identified the right involved as a statutory one, *Bakke* requires a finding of discrimination before any state action invading a "liberty or privacy interest" of an individual, from whatever source derived.

There is no reason to think, my colleagues' position continues, that transfers traceable to the OCR-Board Memorandum of Understanding will in any particular

case constitute a "serious professional setback." Until an individual teacher alleges such harm, there is nothing, in their view, to trigger *Bakke's* requirement of prior findings of discrimination. The simple expectation of being assigned to a particular school within the system is not, then, a right protected under Title VI, Title IX or the Constitution.

*Hiring Goals*

Appellant Caulfield alone challenges paragraph 6 of the Memorandum. That paragraph has two components, the first requiring the Board to perform "a study of the relevant qualified labor pool by race, ethnicity and sex," and the second requiring the Board, through the adoption and implementation of affirmative action procedures, the support and sponsorship of legislation described in paragraph 4 of the Memorandum and other efforts, to achieve levels of minority participation in the teaching and supervisory service "within a range representative of the racial and ethnic composition of the relevant qualified labor pool."

We agree with the district court that HEW did have authority to require a census of the labor pool for the same reason, discussed above, that it had authority to investigate and seek compliance. Caulfield argues that paragraph 6 requires the Board to hire on the basis of a racial quota. He contends that this is improper when there has been no finding of an intention to discriminate. However, any claim that the Board will use race as a factor in its hiring decisions is, on this record, purely conjectural and therefore does not amount to a "case or controversy" under article III of the Constitution. No teacher has alleged that the

Memorandum has affected the consideration of his job application. Appellant has not demonstrated, as he must, that the threatened injury of which he complains is "real and immediate;" rather, it is "conjectural" and "hypothetical." *See O'Shea v. Littleton*, 414 U.S. 488, 494 (1974); *Golden v. Zwickler*, 394 U.S. 103, 108-10 (1969). Indeed, until the Board completes a labor pool study that is acceptable to CCR, the extent of the Board's obligations will not begin to be determined. Appellants themselves have argued that the Board's teaching corps is already within a range representative of the qualified labor pool. If this is true, the Board will not be required to take any action under paragraph 6, much less the kind of race-conscious hiring that Caulfield challenges. Because the court may not entertain purely hypothetical cases, Caulfield's challenge must be dismissed.

Judgment affirmed.

## OPINION AND JUDGMENT DATED SEPT. 5, 1978

**William CAULFIELD et al., Appellants,**

**v.**

**The BOARD OF EDUCATION OF the CITY OF NEW YORK et al., Appellees.**

**Nos. 1144 to 1149, Dockets 78–6035, 78–6044, 78–6058, 78–6066, 78–6080 78–6081 and 6141.**

United States Court of Appeals, Second Circuit.

Argued June 19, 1978.

Decided Sept. 5, 1978.

Morris Weisberg, New York City (Harold F. Hay, New York City, of counsel), for appellant-cross-appellee.

Leonard Greenwald, New York City (Gretchen White Oberman, Lewis, Greenwald & Oberman, New York City, of counsel), for intervenor-appellant-cross-appellee.

Jessica D. Silver, Washington, D. C. (Drew S. Days, III, Asst. Atty. Gen. of the United States, Brian K. Landsberg, Cynthia L. Attwood, Dept. of Justice, Washington, D. C., David G. Trager, U. S. Atty. for the Eastern District of New York, Richard P. Caro, Asst. U. S. Atty., Brooklyn, N. Y., of counsel), for appellee-cross-appellant.

Arthur Eisenberg, New York City (E. Richard Larson, Carol L. Ziegler, New York Civil Liberties Union, Robert H. Hermann, M. L. Taracido, Puerto Rican Legal Defense and Education Fund, Inc., New York City, of counsel), for appellee-cross-appellant.

Doron Gopstein, Asst. Corp. Counsel (Allen G. Schwartz, Corp. Counsel of the City of New York, New York City, of counsel), for appellee New York City.

Nathaniel R. Jones, James I. Meyerson, New York City, Coalition of Concerned Black Educators, for intervenor-appellees-cross-appellants.

Before OAKES and VAN GRAAFEILAND, Circuit Judges, and PIERCE, District Judge.*

OAKES, Circuit Judge:

On this consolidated appeal, the parties challenge two separate orders of the United States District Court for the Eastern District of New York, Jack B. Weinstein, Judge. The first is an order of February 24, 1978, denying the motion of plaintiffs-appellants (appellants) who are New York City teachers, principals, community school board officials and parent-teacher association officials, for a preliminary injunction to prevent city, state and federal officials, defendants-appellees (appellees), from collecting data on the ethnic identification of teachers and supervisors. Appellants appeal the denial of the preliminary injunction against data collection. In the second order, dated March 15, 1978, Judge Weinstein sua sponte remanded the case to the Department of Health, Education & Welfare (HEW) for further administrative proceedings to afford appellants and other interested persons the opportunity to participate in the administrative proceeding. The federal appellees have cross-appealed from the order remanding the proceedings to HEW.

With respect to the order denying the injunction against data collection, we hold that the district court did not abuse its discretion in refusing to halt the collection of ethnic data on teachers and supervisors. We further hold that in its second order the district court erroneously remanded the case to HEW for further proceedings. Accordingly, we affirm the district court's order of February 24, 1978, but reverse its order of March 15, 1978.[1]

## I. *Background*

At this stage of the proceedings, no facts have been found, no stipulation of undisputed facts agreed upon, no evidentiary record developed. For purposes of the appeal, however, we will rely, as the district court did, on documents appended to various pleadings. These documents reveal that the principal subject of this lawsuit is a September 7, 1977, Memorandum of Understanding (Memorandum) between the Office for Civil Rights (OCR) at HEW on the one hand and the Board of Education of the City of New York (City Board) on the other. The Memorandum obligated the City Board to alter certain teacher and supervisor employment and assignment practices and to remedy the discriminatory effect of those practices on a phased basis by 1980. For its part, OCR agreed that the City Board's promised actions would constitute compliance with Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d *et seq.*, and Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681–86.[2]

The process leading up to negotiation of the Memorandum was set in motion on

(Footnotes follow at end of judgment.)

March 18, 1976, when the acting director of OCR wrote to the Chancellor of the City Board to notify him that OCR had received several complaints of discrimination by the City Board against minority teachers. The letter further informed the Chancellor that OCR would conduct a review of employment practices in the New York City school system to evaluate compliance with laws barring discrimination in federally financed programs. Following investigation, OCR informed Chancellor Anker by letter of November 9, 1976, that the City Board was in violation of Section 601 of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, and Section 901 of the Education Amendments of 1972, 20 U.S.C. § 1681.[3] That letter discussed the City Board's employment practices, including its discriminatory methods of selection and assignment of teachers, called for submission of a remedial plan, and concluded by offering assistance in preparing the plan. Affidavits on file indicate that, at or about the same time, the OCR director attended a well publicized public briefing at which he explained OCR's findings and invited comments from those in attendance and from the community at large.

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OCR's letter of November 9 prompted the establishment of an internal City Board committee to examine OCR's allegations. As part of its study, this committee consulted a number of organizations, including some of those participating in this lawsuit as intervenors or amici curiae.[4] On April 22, 1977, before the internal committee had completed its study, the City Board forwarded to OCR its response to the November 9 letter. Without admitting any violation of law, the City Board expressed its determination to rectify "disparate employment opportunities" and proposed an equal

employment opportunity plan to "insure equality of opportunity and avoidance of discrimination.". The City Board's plan suggested affirmative efforts to increase the number of minority teachers, to improve integration of the teaching staff, and to correct disparities of experience, salary and educational level in the distribution of personnel. The plan also advocated goals for integration of faculty based upon a numerical index, legislative replacement of rank order lists with qualifying lists for teacher selection, and a new system of teacher certification and selection. However, OCR found the plan insufficient and notified the City Board on July 6, 1977, that it was principally concerned with the lack of specificity in the City Board's response. Just prior to OCR's rejection of the City Board's plan, the report of the internal City Board committee (the "Gifford Report") was published. The Gifford Report furnished documentary confirmation of the discriminatory and segregative nature of the City Board's employment practices.[5] This report may well have exerted some considerable influence in the City Board's ultimate decision to conclude the Memorandum with OCR.

In negotiating the Memorandum, the City Board requested that the United Federation of Teachers (UFT), though not the other parties, be consulted on the terms of the agreement. The UFT was consulted and it agreed to support the adoption of legislation necessary to effectuate the Memorandum. In a press release the City Board hailed the agreement for having been reached "without resort to the courts or other confrontations that might have polarized our city." The release further described the Memorandum as an agreement which carries forward the existing affirmative action program and accepts a "commit-

ment based on applicable standards of law." After the Memorandum was signed but prior to ratification, the City Board held a public meeting on October 19, 1977, with two weeks' advance notice. Thereafter, the City Board ratified the Memorandum by resolution.

On October 31, 1977, the appellants [6] filed this action seeking a declaration that certain provisions of the Memorandum were unconstitutional, illegal and invalid. They also sought an injunction against the enforcement of those provisions and against requiring the appellants to provide data on the ethnic background of teachers and supervisors. Appellants sought summary judgment or a preliminary injunction. After a hearing, the district court by order of February 24, 1978, ruled only on that part of the motion for a preliminary injunction which sought to enjoin the collection of ethnic data and denied relief.[7] A notice of appeal was filed. This court denied an injunction pending appeal but expedited the appeal.

By the same order, the district court sua sponte directed that the pleadings of all plaintiffs be amended to include a claim that their constitutional and statutory rights were abridged by OCR's failure "to afford them and other interested persons the opportunity . . . to participate in the administrative proceedings." The district court then ordered all parties to appear on March 7, 1978, to show cause why the action should not be remanded for OCR's failure to afford such participation. At the March 7, 1978, hearing no party requested a remand but rather each sought to have the proceedings continue in the district court so that the district judge might decide the legality of the Memorandum. However, on March 15, the court

ordered the agreement vacated and remanded the case to OCR. It also ordered the City Board relieved of its obligations under the Memorandum, denied all pending motions as moot with leave to renew, and stayed all proceedings pending completion of the administrative hearings on remand. This appeal followed.[8]

## II. *Discussion*

### A. Denial of the Preliminary Injunction Against Collection of Ethnic Data

Plaintiffs sought to enjoin the mandatory answering of ethnic questionnaries. These questionnaries were distributed to the school system's community school districts. All supervisors and teachers employed in the city's public schools were required to answer questions pertaining to their race, color, sex and national origin. In denying appellants' motion in the February 24 order, the district court made no findings of fact or conclusions of law, although it did note that there is a clear right and obligation of authorities to gather data in order to determine, *inter alia*, whether there has been unlawful discrimination.

[1] This court has recently clarified the standard for issuance of a preliminary injunction: there must be a showing of possible irreparable injury *and* either (1) probable success on the merits *or* (2) sufficiently serious questions going to the merits to make them a fair ground for litigation *and* a balance of hardships tipping decidedly toward the party requesting the preliminary relief. *Selchow & Righter Co. v. McGraw-Hill Book Co.*, No. 77–7569, slip op. at 3533, 3537, 580 F.2d 25 at 27 (2d Cir. 1978); *Triebwasser & Katz v. American Telephone & Telegraph Co.*, 535 F.2d 1356, 1358 (2d Cir. 1976); *see* Mulligan, *Foreword—Preliminary Injunction in the*

*Second Circuit*, 43 Brooklyn L.Rev. 831, 832–33 (1977). Since appellants neither presented nor sought to present any evidence in support of their motion for a preliminary injunction, all that the district court had before it was a question of law. Absent any evidence, the district court could not conclude that the appellants were likely to suffer irreparable injury, much less that the balance of hardships weighed decidedly in their favor. *See Gillespie & Co. of New York v. Weyerhaeuser Co.*, 533 F.2d 51, 53 (2d Cir. 1976) (per curiam).

Moreover, appellants have failed to show that they are likely to succeed on the merits. *See id.* They argue, first, that because the agreement between OCR and the Board was vacated by the district court, any racial/ethnic survey to be conducted in conjunction with the Memorandum is invalid. However, they have made no showing that the survey of the ethnic composition of the existing staff of the school system would only be conducted because the Memorandum provided for it. Indeed, for all that appears in the record, this survey is one routinely conducted by the City Board as part of its annual school census.

[2] Appellants also argue that because Title VI does not prohibit racial/ethnic discrimination in employment where providing employment is not a primary objective of federal aid, 42 U.S.C. § 2000d–3,[9] OCR cannot lawfully seek statistics regarding the ethnic and racial composition of the teaching staff. However, appellants have mischaracterized the nature of the OCR investigation. The charging letter of November 9, 1976, specifically noted that its concern with discriminatory employment practices was motivated by the unfortunate effect that these practices exercise on minority

schoolchildren: "[B]y assigning teachers to schools in such a manner . . . [,] minority children are generally taught by teachers with less experience, lower salary and fewer advanced degrees." Accordingly, OCR's investigation falls within the parameters of 42 U.S.C. § 2000d,[10] and not 42 U.S.C. § 2000d–3, *see* note 9 *supra*, since the objective of OCR's investigation was to alleviate discrimination against minority schoolchildren and not against minority teachers as such.[11] In the context of this OCR investigation, then, the collection of racial and ethnic data is authorized by Title VI.[12] *See United States v. Jefferson County Board of Education*, 372 F.2d 836, 882–84 (5th Cir. 1966), *aff'd*, 380 F.2d 385 (5th Cir.) (en banc), *cert. denied*, 389 U.S. 840, 88 S.Ct. 67, 19 L.Ed.2d 103 (1967).

[3] Appellant's additional arguments that the proposed census would violate other federal statutes and the Constitution are unpersuasive. The Privacy Act of 1974, 5 U.S.C. § 552a, is invoked but it does not prohibit the collection or retention of such data in this context. Title VI and its regulations authorize the collection of staff data which in turn is permitted to be maintained under 5 U.S.C. § 552a(e)(1).[13] Nor does the Equal Education Opportunities Act, 20 U.S.C. § 1751, prohibit the collection of racial and ethnic staff data.[14] At this stage of the record, where it does not appear whether or not teacher and supervisor assignments in the New York public schools violate Title VI, plaintiffs' assertion that these practices are not violative cannot be taken as fact. Thus any suggestion that OCR's actions are directed at overcoming simple racial imbalance is premature.

[4] Finally, the Constitution itself does not condemn the collection of this data. *Cf. United States v. State of New Hampshire*,

539 F.2d 277, 280–82 (1st Cir.) (upholding as constitutional a requirement pursuant to § 709(c) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e–8(c), that the State provide racial and ethnic employee data to the federal government on an EEO–4 form), *cert. denied*, 429 U.S. 1023 (1976). The one-sentence argument that the census produces a Fourth Amendment violation is frivolous; there is no search or seizure here involved. Nor is there a violation of the constitutional right of privacy of teachers and principals within *Griswold v. Connecticut*, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965), or *Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973). *See* Note, *On Privacy: Constitutional Protection for Personal Liberty*, 48 N.Y.U.L. Rev. 670, 673–78, 697–701, 770–72 (1973); *cf. Whalen v. Roe*, 429 U.S. 589, 97 S.Ct. 869, 51 L.Ed.2d 64 (1977) (statute requiring submission of form with patient's name to State Department of Health in case of certain prescription drugs not unconstitutional); *Schachter v. Whalen*, 581 F.2d 35 (2d Cir. 1978) (statute granting power to subpoena medical records from doctor under investigation by State not unconstitutional).

B. District Court Remand to HEW

[5] The federal appellees, as cross-appellants, argue strenuously that the district court erred in sua sponte remanding the case to HEW.[15] We agree.

[6] Section 602 of Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d–1,[16] provides for three types of action to secure compliance with the substantive provisions of Section 601, 42 U.S.C. § 2000d:[17] (1) refusal to grant or termination of assistance, (2) other means authorized by law such as a reference to the Department of Justice, 45 C.F.R. § 80.8(a);[18] and (3) volun-

tary means. Where the agency seeks to compel compliance through termination of funds or other means, Section 602 requires that the agency proceed by formal means including an administrative hearing at which a record is made. Before doing so, however, HEW must attempt to secure compliance by voluntary means. 42 U.S.C. § 2000d–1; *see* note 16 *supra*.[19]

While HEW's regulations specify a variety of procedures to effectuate fund termination,[20] they do not provide for public participation or a hearing when HEW acts informally.[21] In addition, pursuant to Executive Order 11764 of January 21, 1974, granting the Attorney General authority to prescribe standards and procedures for Title VI enforcement, the Attorney General has adopted regulations which provide simply that any agreement to "take remedial steps . . . shall be set forth in writing by the recipient and the federal agency[,] . . . specify the action necessary for the correction of Title VI deficiencies and . . . be available to the public." 28 C.F.R. § 42.411(b). No other procedures, such as a hearing or public participation, are required. These regulations are entitled to some weight in construing the meaning of Title VI. *See Lau v. Nichols*, 414 U.S. 563, 566–69, 94 S.Ct. 786, 39 L.Ed.2d 1 (1974); *Udall v. Tallman*, 380 U.S. 1, 16, 85 S.Ct. 792, 13 L.Ed.2d 616 (1965).

Because HEW did not seek compliance by fund termination, but rather by a voluntary agreement, HEW was not required to afford cross-appellees an opportunity to participate. The action taken here to effect compliance was precisely the type of action contemplated by Congress in using the phrase "voluntary means." 42 U.S.C. § 2000d–1; *see* note 16 *supra*.

Nevertheless, the district court held that participation was mandatory on the basis that the agreement was not voluntary. The principal reason for the district court's finding of involuntariness was that the City Board, along with the City as a whole, was in the midst of a fiscal crisis and presumably could not afford a fund termination while it litigated the issue of Title VI compliance. But the only fund termination sought by HEW related not to Title VI funds but to Emergency School Aid Act funds.[22] To be sure, a threat of potential fund termination lurked in the background since without such leverage voluntary compliance might possibly never be achieved. And after all, if there is lack of compliance, HEW is obligated to enforce the statute ultimately by terminating funds. *Adams v. Richardson*, 156 U.S.App.D.C. 267, 271, 480 F.2d 1159, 1163 (1973).[23] Undoubtedly then there is a certain amount of coercion inherent in the enforcement scheme. *See United States v. Jefferson County Board of Education, supra*, 372 F.2d at 856 (quoting Report of the United States Commission on Civil Rights, *Survey of School Desegregation in the Southern and Border States—1965–1966*, 2).

Undercutting any actual coercion, however, are several points. The City Board's own study, the Gifford Report, confirmed the conditions cited in the November 9 letter from OCR. Moreover, the City Board's press release indicated that the agreement had been reached in a spirit of cooperation. And of course, the lack of participation by the Council of Supervisors and Administrators (CSA) cannot render a voluntary agreement involuntary. The City Board's commitments under the Memorandum, despite its impact on teachers and supervisors,

came about by the City Board's decision to comply with OCR's interpretation of Title VI, not by any fund-termination action by OCR. *Cf. Maher v. Roe*, 432 U.S. 464, 475–76 & n. 9, 97 S.Ct. 2376, 2383, 53 L.Ed.2d 484 (1977) (distinction between direct "interference with a protected activity and . . . encouragement of an alternative [permissible] activity"). In addition, there was ample opportunity to communicate with the City Board between the time the terms of the agreement became publicly known and the time of its ratification, but no party, including CSA, sought to participate during that hiatus, although most parties were consulted in the interim.

In any event, the statutory scheme requires a hearing with notice only when HEW seeks fund termination. *See, Board of Public Instruction of Palm Beach County v. Cohen*, 413 F.2d 1201, 1202–03 (5th Cir. 1969). Where, as here, Congress has determined what procedures shall be required in effecting compliance with Title VI, the courts may not override that determination simply because they believe other procedures would be preferable. *See Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 546, 98 S.Ct. 1197, 55 L.Ed.2d 460 (1978).

Order denying preliminary injunction on collection of racial/ethnic data affirmed; order remanding to HEW for administrative proceedings reversed; cause remanded to the district court for hearing on the merits.

## Footnotes

1. In view of the posture of the case below and the questions certified in the order for appeal under 28 U.S.C. § 1292(b), *see* note 8 *infra*, we do not reach three questions which were not decided on the merits below but are here raised by the appellants. Appellants argue that (1) HEW and the Office for Civil Rights (OCR) do not have power to take action upon allegations that the employment practices of the appellee, Board of Education of the City of New York (City Board) discriminated illegally and unconstitutionally against minorities, (2) the City Board's employment practices complained about in a letter of OCR to the City Board dated November 9, 1976, *see* note 3 *infra*, do not constitute illegal and unconstitutional racial discrimination against minorities and (3) the Memorandum of Understanding between the City Board and OCR, *see* note 2 *infra*, and the City Board's actions carrying out its provisions unconstitutionally denied appellants equal protection of the laws by resulting in "reverse discrimination" and deprived them of liberty and property without due process of law.

2. The Memorandum committed the City Board to undertake a number of actions, some of which include:

> 1. Not later than September of 1979, the teacher corps of each District in the system will reflect, within a range of five percent, the racial-ethnic composition of the system's teacher corps as a whole for each educational level and category, subject only to educationally-based program exceptions.
>
> 2. Not later than September of 1980, each individual school in the system will reflect, within a range of five percent, the racial-ethnic composition of the system's teacher corps as a whole for each educational level and category, subject only to educationally-based program exceptions.
>
> 3. The Board of Education will demonstrate to the Office for Civil Rights, subject to prescribed review that any failure to meet the commitments set forth in paragraphs one and two hereof results from genuine requirements of a valid educational program. In addition, the Board will demonstrate that it

has made and is continuing to make special efforts to overcome the effects of educationally-based program exceptions through effective use of such mechanisms as recertification, recruitment and special assignment of teachers.

* * * * * *

6. The Board agrees, as soon as practicable to have performed a study of the relevant qualified labor pool by race, ethnicity, and sex by an independent expert acceptable to the parties and pursuant to methodology and standards agreed to by the parties.

It is understood that this commitment shall not require the Board to lay off any teacher currently employed by the Board or to hire any teacher who has not met appropriate requirements for employment, not inconsistent with this agreement. It is further understood that the commitment made herein does not establish quotas. Failure to meet this commitment shall not be considered a violation of this agreement if the Board demonstrates that it has implemented the provisions of this agreement in a good faith effort to meet the commitment made herein.

The Board has advised the Office for Civil Rights that the Board expects to consult with the United Federation of Teachers and others regarding the selection of the independent expert and the standards and methodology to be used in the above study.

* * * * * *

3. The letter stated in pertinent part:

With respect to employment practices I have concluded that the New York City school system, in violation of section 601 of the Civil Rights Act of 1964 (42 U.S.C. [§] 2000d), has, on the basis of race and national origin:

(1) denied minority teachers full access to employment opportunity through the use of racially discriminatory selection and testing procedures and through the use of racially identifiable employment pools in a manner that discriminatorily restricts the placement of minority teachers;

(2) assigned teachers, assistant principals and principals in a manner that has created, confirmed and reinforced the racial and/or ethnic identifiability of the system's schools; and

(3) assigned teachers with less experience, lower average salaries and fewer advanced degrees to schools which have higher percentages of minority students.

I have also concluded that the New York City school system, in violation of section 901 of the Education Amendments of 1972 (20 U.S.C. [§] 1681), has, on the basis of sex:

(1) denied females equal access to positions as principals and assistant principals throughout the system;

(2) provided a lower level of financial support for female athletic coaching programs; and

(3) deprived female teachers of seniority rights and other compensation through failure to eliminate the effects of past discriminatory leave policies.

4. These organizations included the American Jewish Congress, the United Federation of Teachers (UFT), the Council of Supervisors and Administrators (CSA), the NAACP and the New York Civil Liberties Union.

5. In part, the Gifford Report summarized its conclusions as follows:

(1) *There is an inexplicable, non-rational disparity between the percentage of minority teachers in the New York City school system and the percentage of minority teachers in 46 other non-southern, urban school systems.*

In order to dismiss or affirm the possibility that the recruitment, selection, and placement practices of the New York public schools contributed to this disparity, we developed a sophisticated econometric model of the social and economic relationships affecting the size of the minority teacher population in New York City and 46 other non-southern, urban cities. The results of the analysis show, in rather stark terms, that the percentage of minority teachers in the New York City public schools is less than one-half of what one would expect to find, if New York City were to "behave" like other cities.

This result, in and of itself, does not constitute proof of discrimination. It does indicate, however, that the percent of minority teachers in the public school system of New York City is far lower than it should be, given the available pool of minority college graduates

in New York City and the characteristics of the New York City labor market.

(2) *Minority teachers are channeled into elementary and junior high schools in a manner that corresponds to the racial composition of the schools.*

This finding comes as no surprise since these results were anticipated by the state legislature when it mandated that teachers hired through the alternative method (NTE and "out of rank order" teachers) be restricted to elementary and junior high schools having high concentrations of educationally disadvantaged pupils.

(Emphasis in original.)

6. The district court granted numerous motions to intervene, including those of the UFT, the CSA, several community school boards, the Coalition of Concerned Black Educators, several black teachers represented by the NAACP, Ronald Ross (a black teacher represented by the New York Civil Liberties Union), the Public Education Association, and the American Civil Liberties Union.

7. The district judge stayed his order for 14 days to give appellants an opportunity to appeal.

8. The March 15 order was certified in accordance with 28 U.S.C. § 1292(b). This court granted petitions for leave to appeal and cross-appeal and consolidated the appeal from the March 15 order with the appeal from the February 24 order.

9. Nothing contained in this subchapter shall be construed to authorize action under this subchapter by any department or agency with respect to any employment practice of any employer, employment agency, or labor organization except where a primary objective of the Federal financial assistance is to provide employment.

42 U.S.C. § 2000d-3.

10. No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

*Id.* § 2000d.

11. 45 C.F.R. § 80.3(c)(3), which deals with the relationship between 42 U.S.C. § 2000d and 42 U.S.C. § 2000d-3, provides:

> Where a primary objective of the Federal financial assistance is not to provide employment, but discrimination on the ground of race, color, or national origin in the employment practices of the recipient or other persons subject to the regulation tends, on the ground of race, color, or national origin, to exclude individuals from participation in, to deny them the benefits of, or to subject them to discrimination under any program to which this regulation applies, the foregoing provisions of this paragraph (c) shall apply to the employment practices of the recipient or other persons subject to the regulation, to the extent necessary to assure equality of opportunity to, and non-discriminatory treatment of, beneficiaries.

12. OCR has authority to collect racial data in school systems under the Emergency School Aid Act as well. *See* 20 U.S.C. § 1605(d)(1); 45 C.F.R. § 185.13(*l*); *Board of Education v. Califano*, 584 F.2d 576 at 582-585 (2d Cir. 1978).

13. Each agency that maintains a system of records shall—

> (1) maintain in its records only such information about an individual as is relevant and necessary to accomplish a purpose of the agency required to be accomplished by statute or by executive order of the President[.]

5 U.S.C. § 552a(e)(1).

14. No provision of this Act shall be construed to require the assignment or transportation of students or teachers in order to overcome racial imbalance.

20 U.S.C. § 1751; *cf. Darville v. Dade County School Board*, 497 F.2d 1002, 1004-05 (5th Cir. 1974) (20 U.S.C. § 1651, which is identical to 20 U.S.C. § 1751, does not foreclose school assignment plans voluntarily adopted by school board which exceed constitutional minimums and the means, such as transportation, to carry out the plan).

15. Cross-appellants contend that the district court erred in raising and deciding a claim for relief not made by any party on the ground that there was no case or controversy. Since none of the parties except CSA raised any procedural question and since CSA itself did not specifi-

cally seek the remand to HEW which the district court ordered, cross-appellants argue that the propriety of the remand has not been presented in an adversary context. *See O'Shea v. Littleton*, 414 U.S. 488, 493, 94 S.Ct. 669, 38 L.Ed.2d 674 (1974); *Jenkins v. McKeithen*, 395 U.S. 411, 423, 89 S.Ct. 1843, 23 L.Ed.2d 404 (1969) (Marshall, J.); *Flast v. Cohen*, 392 U.S. 83, 96-97, 88 S.Ct. 1942, 20 L.Ed.2d 947 (1968). We are persuaded, however, that the requisite case or controversy exists. Even though CSA did not in haec verba request the district court to remand the case to HEW, CSA did ask that the memorandum be held illegal for not permitting its participation; and CSA was careful to pray for such relief as the court deemed proper. *See Robinson v. Lorillard Corp.*, 444 F.2d 791, 802-03 (4th Cir. 1971), *cert. dismissed*, 404 U.S. 1006, 1007, 92 S.Ct. 573, 30 L.Ed.2d 655 (1972); 10 C. Wright & A. Miller, *Federal Practice and Procedure* § 2664, at 108-09 (1973); Fed.R. Civ.P. 54(c). In addition, at this stage in the proceedings, CSA has explicitly argued that the remand to HEW was proper. Consequently, the district court had and this court has jurisdiction to decide the question of the remand to HEW.

16. Compliance with any requirement adopted pursuant to this section may be effected (1) by the termination of or refusal to grant or to continue assistance under such program or activity to any recipient as to whom there has been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement, but such termination or refusal shall be limited to the particular political entity, or part thereof, or other recipient as to whom such a finding has been made and, shall be limited in its effect to the particular program, or part thereof, in which such non-compliance has been so found, or (2) by any other means authorized by law: *Provided, however*, That no such action shall be taken until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means.

42 U.S.C. § 2000d-1.

17. *See* note 10 *supra*.

18. If there appears to be a failure or threatened failure to comply with this regulation, and if the noncompliance or threatened noncompliance cannot be corrected by informal means, compliance with this part may be effected by the suspension or termination of or refusal to grant or to continue Federal financial assistance or by any other means authorized by law. Such other means may include, but are not limited to, (1) a reference to the Department of Justice with a recommendation that appropriate proceedings be brought to enforce any rights of the United States under any law of the United States (including other titles of the Act), or any assurance or other contractual undertaking, and (2) any applicable proceeding under State or local law.

45 C.F.R. § 80.8(a).

19. Congress's intent that HEW use voluntary means to secure compliance with Title VI before resorting to fund termination is clear. Senator Humphrey stated that

> [t]he first step, in all cases, will be advice to the appropriate person or persons and a reasonable effort to secure voluntary compliance. Obviously no hearing is required in connection with such efforts at voluntary compliance.

110 Cong.Rec. 8979 (1964). And Senator Ribicoff added:

> The agency could not immediately cut off the funds. As I view this matter, I hope that in the case of every agency and every county involved the officials of the agency would sit down with the officials of the county and would try to settle the problems voluntarily, before any action would be taken, including action to cut off funds, which would be the last resort.

110 Cong.Rec. 13129 (1964).

20. (c) . . . No order suspending, terminating or refusing to grant or continue Federal financial assistance shall become effective until (1) the responsible Department official has advised the applicant or recipient of his failure to comply and has determined that compliance cannot be secured by voluntary means, (2) there has been an express finding on the record, after opportunity for hearing, of a failure by the applicant or recipient to comply with a requirement imposed by or pursuant to this part, (3) the expiration of 30 days after the Secretary has filed with the

committee of the House and the committee of the Senate having legislative jurisdiction over the program involved, a full written report of the circumstances and the grounds for such action. . . .

(d) . . . No action to effect compliance by any other means authorized by law shall be taken until (1) the responsible Department official has determined that compliance cannot be secured by voluntary means, (2) the recipient or other person has been notified of its failure to comply and of the action to be taken to effect compliance, and (3) the expiration of at least 10 days from the mailing of such notice to the recipient or other person. During this period of at least 10 days additional efforts shall be made to persuade the recipient or other person to comply with the regulation and to take such corrective action as may be appropriate.

45 C.F.R. § 80.8(c)–(d).

(a) *Opportunity for hearing.* Whenever an opportunity for a hearing is required by § 80.8(c), reasonable notice shall be given by registered or certified mail, return receipt requested, to the affected applicant or recipient. This notice shall advise the applicant or recipient of the action proposed to be taken, the specific provision under which the proposed action against it is to be taken, and the matters of fact or law asserted as the basis for this action, and either (1) fix a date not less than 20 days after the date of such notice within which the applicant or recipient may request of the responsible Department official that the matter be scheduled for hearing or (2) advise the applicant or recipient that the matter in question has been set down for hearing at a stated place and time. . . . An applicant or recipient may waive a hearing and submit written information and argument for the record. The failure of an applicant or recipient to request a hearing for which a date has been set shall be deemed to be a waiver . . . .

(b) *Time and place of hearing.* . . . Hearings shall be held before a hearing examiner . . . .

(c) *Right to counsel.* In all proceedings under this section, the applicant or recipient and the Department shall have the right to be represented by counsel.

(d) *Procedures, evidence, and record.* (1) The hearing, decision, and any administrative review thereof shall be conducted in con-

formity with sections 5–8 of the Administrative Procedure Act, and in accordance with such rules of procedure as are proper (and not inconsistent with this section) relating to the conduct of the hearing, giving of notices subsequent to those provided for in paragraph (a) of this section, taking of testimony, exhibits, arguments and briefs, requests for findings, and other related matters. Both the Department and the applicant or recipient shall be entitled to introduce all relevant evidence . . . .

(2) Technical rules of evidence shall not apply to hearings conducted pursuant to this part, but rules or principles designed to assure production of the most credible evidence available and to subject testimony to test by cross-examination shall be applied where reasonably necessary by the officer conducting the hearing. The hearing officer may exclude irrelevant, immaterial, or unduly repetitious evidence. All documents and other evidence offered or taken for the record shall be open to examination by the parties and opportunity shall be given to refute facts and arguments advanced on either side of the issues. A transcript shall be made of the oral evidence except to the extent the substance thereof is stipulated for the record. All decisions shall be based upon the hearing record and written findings shall be made.

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45 C.F.R. § 80.9(a)–(d).

21. (d) *Resolution of matters.* (1) If an investigation pursuant to paragraph (c) of this section indicates a failure to comply with this part, the responsible Department official or his designee will so inform the recipient and the matter will be resolved by informal means whenever possible. If it has been determined that the matter cannot be resolved by informal means, action will be taken as provided for in § 80.8.

45 C.F.R. § 80.7(d)(1).

22. *See Board of Education v. Califano, supra.*

23. *See* Stewart, *The Reformation of American Administrative Law*, 88 Harv.L.Rev. 1667, 1772–73 (1975).

The resource and delay costs of formal proceedings are incurred by the agency as well as private parties and may seriously undermine the effective discharge of agency responsibilities. These burdens will mount as previously informal decisions on enforcement policies are subjected to formal processes of resolution. Increased procedural formalities may work to the disadvantage of public interest groups by exhausting their limited resources and providing organized interests a basis for delaying agency enforcement actions. Moreover, formal trial-type proceedings in many contexts may be inferior to informal negotiations as a means of agency dispute resolution and decision-making. The complex scientific, technological, social and economic issues presented in so much of current administration are often ill-suited for resolution by adjudicatory procedures that produce gargantuan records whose size "varies inversely with [their] usefulness." Judicialization of agency procedures and the expansion of participation rights may also aggravate the tendency for the agency to assume a passive role, focusing on the unique character of each controversy in order to reach an ad hoc accommodation of the particular constellation of interests presented.

(Footnotes omitted.)